FOR ARGUMENT

(8)

No. 95-1918

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF ARKANSAS, PETITIONER

v.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether this case should have been dismissed by the district court for lack of subject-matter jurisdiction, in light of the Tax Injunction Act, 28 U.S.C. 1341.

2. Whether the State of Arkansas may levy sales and income taxes upon production credit associations consistent with 12 U.S.C. 2077.

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INTEREST OF THE UNITED STATES

This case concerns the scope of federal district courts' jurisdiction under the Tax Injunction Act, 28 U.S.C. 1341, in cases involving certain federal instrumentalities when the United States is not a co-plaintiff. If the district court correctly exercised subject-matter jurisdiction, the case also concerns whether Congress has exempted from state taxation a privately owned, for-profit agricultural lending association chartered as a federal instrumentality under the Farm Credit Act of 1971, 12 U.S.C. 2001 *et seq.*, as

amended by the Farm Credit Amendments Act, Pub. L. No. 99-205, 99 Stat. 1678 (1985). The United States has a substantial interest in ensuring that statutorily defined federal instrumentalities are taxed by the States solely in accordance with federal law and that the Tax Injunction Act is properly applied to federal instrumentalities. In response to this Court's invitation, the United States filed a brief at the petition stage.

STATEMENT

1. Respondents are four production credit associations chartered by the Farm Credit Administration in accordance with the Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583, as amended (12 U.S.C. 2001 *et seq.*). Pet. App. B1. The associations are part of the United States' Farm Credit System, which was created more than 80 years ago with the passage of the Federal Farm Loan Act, ch. 245, 39 Stat. 360 (1916). Today, the Farm Credit System includes farm credit banks, federal land bank associations, and banks for cooperatives. 12 U.S.C. 2002(a) (App., *infra*, 1a).

Like other entities within the Farm Credit System, production credit associations are statutorily identified as instrumentalities of the United States. 12 U.S.C. 2071(a) and (b)(7) (App., *infra*, 1a-2a) (production credit associations); 12 U.S.C. 2011(a) (farm credit banks), 2091(a) and (b)(4) (federal land bank associations), 2121 (banks for cooperatives). Production credit associations are organized generally by ten or more farmers or ranchers to provide short- and intermediate-term production or operation agricultural loans. 12 U.S.C. 2071(b)(1) (App., *infra*, 1a). H.R. Rep. No. 425, 99th Cong., 1st Sess. 111 (1985). To encourage and assist those associations, the United

States (through production credit corporations) originally subscribed to some of the stock in production credit associations formed under the Farm Credit Act of 1933, ch. 98, §§ 2, 6, 48 Stat. 257, 259. See H.R. Rep. No. 425, *supra*, at 116; H.R. Rep. No. 593, 92d Cong., 1st Sess. 8 (1971). Over time, farmer-members of production credit associations purchased the stock owned by the United States as a precondition to obtaining credit. See H.R. Rep. No. 425, *supra*, at 116; see also Farm Credit Act of 1933, ch. 98, § 23, 48 Stat. 261. By 1968, the United States' ownership interest in previously organized associations had been completely retired, and production credit associations were owned entirely by their private borrower-members. H.R. Rep. No. 425, *supra*, at 116; H.R. Rep. No. 593, *supra*, at 8.

As of 1995, 66 chartered production credit associations operated throughout the United States. Farm Credit Admin., *1995 Annual Report on the Financial Condition and Performance of the Farm Credit System* 5 (1996) (*1995 Annual Report*). The production credit associations, together with other Farm Credit System associations that provide similar direct agricultural loans, maintained a loan portfolio of more than $13 billion in 1995. *Id.* at 18. In that year, the combined gross income of those entities from loans, investments, and other sources was more than $3 billion, and their net income was almost $600 million. *Id.* at 40.[1]

2. In the Farm Credit Act of 1933, Congress specifically exempted from all federal, state, and local

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[1] These figures include production credit associations, agricultural credit associations, and federal land credit associations. See *1995 Annual Report* 40 n.1.

taxation ("except surtaxes, estate, inheritance, and gift taxes"), the obligations of production credit associations, such as notes, debentures and bonds, "both as to principal and interest." Ch. 98, § 63, 48 Stat. 267 (App., *infra*, 3a). Congress also provided an exemption from taxation for associations in which the United States held an ownership interest. In that event, those associations were exempted from all taxation, except that their real property and their tangible personal property were subject to "Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed." *Id.* at 4a. If and when the United States retired its stock ownership in a production credit association, however, the exemption from taxation of the association, its property, and its income was no longer effective. *Ibid.* In fact, many production credit associations had retired the United States' capital investment entirely by 1947, H.R. Rep. No. 425, *supra*, at 116, and, by 1968, were paying millions of dollars each year in federal, state, and other income taxes, see, *e.g.*, Farm Credit Admin., *34th Annual Report of the Farm Credit Administration: 1966-1967*, at 88 (1968).

When Congress amended the Farm Credit Act in 1971, all previously organized production credit associations were privately owned. H.R. Rep. No. 593, *supra*, at 8. To assist in aiding agricultural lending entities during financial emergencies, Congress empowered the Governor of the Farm Credit Administration to purchase stock in the various institutions established within the Farm Credit System, including production credit associations. Pub. L. No. 92-181, § 4.0, 85 Stat. 609. Just as it had before the 1971 amendments, therefore, Congress retained each pro-

duction credit association's stated exemption from taxation—an exemption contingent on ownership of stock in the association by the United States (now through the Farm Credit Administration instead of production credit corporations, as before). § 2.17, 85 Stat. 602 (App., *infra*, 2a-3a). The amended statute provided:

> Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority. *Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit*

associations is held by the Governor of the Farm Credit Administration.

Ibid. (emphasis added).

By 1985, a poor agricultural economy had driven the Farm Credit System into a financial crisis. See H.R. Rep. No. 425, *supra*, at 6-11. Congress enacted the Farm Credit Amendments Act, Pub. L. No. 99-205, 99 Stat. 1678 (1985), to permit the Farm Credit System to use its own resources in addressing the financial needs of members. See H.R. Rep. No. 425, *supra*, at 11, 14. Among other things, the 1985 Act restructured the Farm Credit Administration, modified its role within the Farm Credit System, and made it a more independent regulator. See Pub. L. No. 99-205, § 201(7), 99 Stat. 1691-1693; H.R. Rep. No. 425, *supra*, at 11-13, 28. No longer could the Farm Credit Administration own stock directly in production credit associations.[2]

In addition to changes in "the basic powers, duties and authorities of the Farm Credit Administration,"

[2] Although the Farm Credit Administration no longer was authorized to provide any separate capital assistance directly to institutions such as production credit associations, it could make investments from the United States' "revolving fund" in the newly created Farm Credit System Capital Corporation. Pub. L. No. 99-205, § 101, 99 Stat. 1678; H.R. Rep. No. 425, *supra*, at 28-29. The Capital Corporation became solely responsible for providing financial and technical assistance to institutions experiencing difficulties, with its funds being raised mostly internally from other institutions in the Farm Credit System. Pub. L. No. 99-205, § 103, 99 Stat. 1680-1687; H.R. Rep. No. 425, *supra*, at 13-15. The Farm Credit System Assistance Board and the Farm Credit System Financial Assistance Corporation have since replaced the Farm Credit System Capital Corporation. Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 201, 101 Stat. 1585-1605.

the Act also contained "numerous technical and conforming amendments." H.R. Rep. No. 425, *supra*, at 28; see Pub. L. No. 99-205, § 205, 99 Stat. 1703-1707. The technical amendments deleted the two sentences within Section 2.17 of the 1971 Act italicized above that exempted a production credit association from taxation contingent upon stock ownership by the "Governor of the Farm Credit Administration." Pub. L. No. 99-205, § 205(e)(16), 99 Stat. 1705. The 1985 Act left Section 2.17, then codified at 12 U.S.C. 2098 (Supp. III 1985), much as it currently exists, now codified at 12 U.S.C. 2077 (App., *infra*, 2a).[3] The amended Section 2077 retains the 60-year-old statutory exemption from federal, state, and local taxes for "all notes, debentures, and other obligations issued by" the production credit associations, "except surtaxes, estate, inheritance, and gift taxes." The statute does not afford the associations themselves any additional exemptions from taxation, regardless of the federal government's stock holdings.

3. Respondents brought suit in the United States District Court for the Eastern District of Arkansas against the State of Arkansas, requesting both a declaratory judgment that they are exempt from state sales and income taxes and an injunction prohibiting

[3] In 1988, Congress reenacted without any change the text of Section 2098, which was redesignated as Section 2077, in the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 401, 101 Stat. 1633. Congress subsequently amended Section 2077 by inserting a comma after "interest" and by adding a second exception to the tax exemption, inserting the clause "except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder" after "authority." Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100-399, § 401(r), 102 Stat. 998.

petitioner from levying such taxes upon them. Pet. App. A1. The United States neither joined the suit as a co-plaintiff nor authorized respondents' action. In their motion for summary judgment, respondents contended that they are entitled to constitutional immunity from state taxes because they are instrumentalities of the United States and because Congress has not expressly waived the immunity from taxation they enjoy as such. *Id.* at A2. Petitioner conceded that respondents are federal instrumentalities, *id.* at A3, but argued that federal instrumentality status does not *per se* entitle respondents to state and local tax immunity, and that there must be a factual inquiry into respondents' governmental nature before they may be deemed to be instrumentalities immune from state taxation, *id.* at A2. Alternatively, petitioner contended that the history of Section 2077 demonstrated that Congress had granted production credit associations only a limited exemption from taxation and, therefore, had waived respondents' constitutional immunity. See *id.* at A6.

The district court granted respondents' motion for summary judgment on the ground that respondents, as federal instrumentalities, are immune from state taxation unless Congress has expressly waived that immunity. Pet. App. B1-B3. The district court also rejected petitioner's argument that the Tax Injunction Act, 28 U.S.C. 1341, divested the court of jurisdiction over respondents' suit, citing this Court's decision in *Department of Employment* v. *United States*, 385 U.S. 355 (1966). Pet. App. B1-B2.

4. A divided court of appeals affirmed, without addressing jurisdiction in light of the Tax Injunction Act. Pet. App. A1-A12. On the merits, the court held that "states have no power to tax federally created

instrumentalities absent Congressional authorization" under the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2. Pet. App. A3. The court viewed the factual extent of the United States' control or ownership of respondents as irrelevant, because production credit associations are statutorily defined federal instrumentalities performing recognized constitutional functions. *Id.* at A4-A5. The court also determined that Congress's failure to provide statutorily that production credit associations are immune from taxation does not create an implied waiver of the immunity under the Supremacy Clause. *Id.* at A6. Any waiver from the constitutional immunity must be express, and "[t]here is no provision in any statute * * * which indicates an intent on the part of Congress to waive the [production credit associations'] tax immunity as federal instrumentalities." *Ibid.*

In dissent, Judge Loken stated that it is solely Congress's province to decide which and to what extent federal instrumentalities are entitled to immunity from state taxation. Pet. App. A6-A7. After tracing the history of production credit associations, he observed that the only comprehensive tax exemption Congress had ever granted such an association had been contingent upon the United States' stock ownership in it. *Id.* at A8-A10. By 1968, however, the United States did not own stock in any production credit association. *Id.* at A10. Judge Loken emphasized the legislative history of the 1985 amendment to Section 2077 that deleted the sentences conferring the contingent tax exemption. He read that legislative history to establish Congress's intent for the amendment to create only a "technical change" that

was likely designed to remove the reference to the Governor of the Farm Credit Administration:

> Although more than the reference to the Governor was deleted, that is a logical explanation since there were *no* publicly-owned [production credit associations] in 1985 eligible to enjoy the deleted exemption. But this court has now construed a seemingly innocuous technical amendment as instead conferring an implied grant of blanket immunity from state and local taxation. In other words, the court construes the repeal of a limited express exemption for which no [production credit association] remained eligible, as the grant of a far broader implied exemption.

Id. at A11. Judge Loken concluded that, because production credit associations were not in fact exempt from taxation before the 1985 amendment to Section 2077, they are not entitled to exemption after the amendment. *Id.* at A12.

SUMMARY OF ARGUMENT

I. The courts below erred in not dismissing this case for lack of jurisdiction under the Tax Injunction Act, 28 U.S.C. 1341. That Act generally divests federal courts of subject-matter jurisdiction over suits to enjoin the imposition of state taxes. This Court has recognized an exception to the Act, however, for "suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966). That exception does not apply to production credit associations suing by themselves without the United States as a co-plaintiff.

Under any test subsequently utilized by the courts of appeals (other than the court below in this case), a federally chartered, privately owned entity that performs no governmental or regulatory function and exists to make profits for its members cannot avoid the Tax Injunction Act unless the United States joins the suit as a co-plaintiff to protect sovereign interests. This Court need not reach the question whether *Department of Employment* extends to other federal agencies or instrumentalities suing on their own, because the production credit associations here do not assert any interest of the federal government sufficient to overcome the prohibition against federal court interference with the collection of state taxes that Congress provided in the Tax Injunction Act.

II. On the merits, the decision below erroneously construed the Farm Credit Act of 1971, 12 U.S.C. 2077, to exempt production credit associations from state sales and income taxes. The Farm Credit Act of 1933, which created production credit associations, gave them a broad exemption from taxation, but only for so long as the federal government maintained stock holdings in them. After 1968, the federal government has not held any stock in a production credit association. Since that time, therefore, the obligations of all such associations enjoyed a limited express exemption from taxation but the associations were liable for the types of state sales and income taxes Arkansas seeks to impose here.

In 1985, Congress enacted technical amendments that deleted the broader exemption from tax that had applied before 1968 to production credit associations that were partially owned by the federal government. In ruling that Congress evinced no intent to subject

production credit associations to state taxes, the court below in effect interpreted the 1985 technical amendments as if Congress had deleted the condition precedent to the broad exemption—the federal government's stock ownership—but had not deleted the exemption itself. There is no support in the language of the amendment or the history of Section 2077 for that extraordinary result.

Similarly, the statutory context of other lending institutions in the Farm Credit System demonstrates that Congress intentionally provided production credit associations with only a limited exemption from taxation only with respect to their obligations. Other entities in that System, such as farm credit banks and federal land bank associations, have been granted expressly the exemption that the court below held should be implied for production credit associations. Had Congress wished to confer on those associations the comprehensive tax exemption that it provided to other institutions in the Farm Credit System, it presumably would have done so. Because the associations' exemption from taxation is narrowly drawn to apply to their obligations alone, therefore, it does not extend to the sales and income taxes at issue.

ARGUMENT

I. THE DISTRICT COURT LACKED SUBJECT-MATTER JURISDICTION OF THIS ACTION, IN LIGHT OF THE TAX INJUNCTION ACT, 28 U.S.C. 1341

A. The Tax Injunction Act Prohibits Suits In Federal Court To Enjoin State Taxes Unless The Suit Is Brought To Assert Governmental Or Regulatory Functions Of The United States

The Tax Injunction Act, 28 U.S.C. 1341,[4] provides as follows:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.[5]

The Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 73 (1976). Notwithstanding the broad prohibition stated in the

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[4] Act of Aug. 21, 1937, ch. 726, 50 Stat. 738. See H.R. Rep. No. 1503, 75th Cong., 1st Sess. (1937); S. Rep. No. 1035, 75th Cong., 1st Sess. (1937).

[5] The question of subject-matter jurisdiction is non-waivable and may be raised at any point in litigation. *Sumner* v. *Mata*, 449 U.S. 539, 547 n.2 (1981). This Court has held that the statutory prohibition contained in the Tax Injunction Act is jurisdictional and applies to suits for injunction or declaratory judgment. *California* v. *Grace Brethren Church*, 457 U.S. 393 (1982); *Franchise Tax Bd.* v. *Alcan Aluminium Ltd.*, 493 U.S. 331 (1990). *Cf. Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943).

Act, this Court has recognized an important exception to its reach: "[W]e conclude, in accord with an unbroken line of authority and convincing evidence of legislative purpose, that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966) (footnotes omitted).

1. As this Court recognized in *Department of Employment*, all of the cases in which the federal government theretofore had sought to avoid the prohibition contained in the Tax Injunction Act involved suits by the United States on behalf of itself or one of its instrumentalities. See 385 U.S. at 358 n.6 (collecting cases). At that time, neither this Court nor the lower federal courts had addressed whether a federal instrumentality suing on its own could avoid the limitation on district court jurisdiction contained in the Tax Injunction Act. And, in that case itself the United States and the American National Red Cross, as co-plaintiffs, had invoked the jurisdiction of a three-judge federal district court to seek an injunction against imposition of the Colorado unemployment compensation tax upon the Red Cross, as a federal instrumentality.

As the Court in *Department of Employment* also recognized, Congress evinced no intent in the legislative history to make the Tax Injunction Act applicable to the federal government. See 385 U.S. at 358 n.7 (citing legislative history). Instead, the particular problem Congress sought to ameliorate in the Act was the bringing of suits by out-of-state corporations to challenge state and local taxes in federal court proceedings that would not be available to in-state citizens. See S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1503, 75th Cong., 1st Sess. 2-3 (1937); 81 Cong. Rec. 1416-1417 (1937) (statement of Sen. Homer Bone). Because neither the language nor the history of the Tax Injunction Act contained any indication that the federal government's authority was to be restricted, the Court's recognition of an exception in *Department of Employment* adhered to the settled principle that "general statutes imposing restrictions do not apply to the Government itself without a clear expression to that effect." *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). See also *United States* v. *United Mine Workers*, 330 U.S. 258, 272 (1947) ("There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect.").

2. Although federal courts have long been barred from exercising jurisdiction over suits brought to stay pending proceedings in state courts, see Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335, codified at 28 U.S.C. 2283, the Tax Injunction Act was one of several federal statutes enacted in the wake of *Ex parte Young*, 209 U.S. 123 (1908), to limit the jurisdiction of federal district courts over actions brought to enjoin or declare invalid various types of state actions. The initial response by Congress to *Ex parte Young* was to require federal district courts composed of three judges to hear certain kinds of constitutional challenges to state actions. See generally C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §§ 4236-4237 (1988 & Supp. 1996). Subsequently, Congress enacted the Johnson Act, which deprived federal district courts of jurisdiction to enjoin the operation

of, or compliance with, any order of a state administrative agency or local rate-making body fixing rates for a public utility whenever specified conditions were met. Act of May 14, 1934, ch. 283, § 1, 48 Stat. 775, codified at 28 U.S.C. 1342. The Tax Injunction Act of 1937 was intended to apply similar principles of federalism and comity to prohibit actions brought in federal courts to enjoin or declare invalid state taxes. See, *e.g.*, 81 Cong. Rec. 1415 (1937); see generally C. Wright, et al., *supra*, § 4237.

Whether and in what circumstances federal instrumentalities may avoid these jurisdictional prohibitions in suits undertaken without the participation of the United States as a co-plaintiff[6] has not been definitively decided by this Court. Of the three statutory limitations on federal jurisdiction noted above—Sections 1341, 1342, and 2283—this Court has addressed that issue only under Section 2283.

In *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971), this Court considered whether a federal agency with its own litigating authority in the lower courts is ex-

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[6] By statute, only the Department of Justice may represent the United States in litigation. Section 516 of Title 28 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

By statute, each production credit association has the power to "sue and be sued," 12 U.S.C. 2073(4), but that provision does not empower a production credit association to represent the United States in litigation; it only authorizes the production credit association to represent itself in the filing or defense of a lawsuit. See *ibid.*

empt from the proscription on enjoining state court proceedings contained in 28 U.S.C. 2283. In holding that Section 2283 does not prohibit the NLRB from suing in federal district court to enjoin a state court from limiting the rights of labor unions to engage in organizing activities, the Court observed that the "purpose of § 2283 was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights." 404 U.S. at 146. In *Nash-Finch*, the Court emphasized that it could not conclude that the general prohibition of Section 2283 "had as its purpose the frustration of federal systems of regulation." *Ibid.* The Court noted that it had previously held that suits brought in the name of the United States are exempt from the proscription of Section 2283, see, *e.g.*, *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957), and that predecessor statutes to Section 2283 had been construed to permit federal agencies to seek injunctions in federal courts, *Bowles* v. *Willingham*, 321 U.S. 503, 510 (1944).

Nash-Finch thus establishes that an implied exception to Section 2283 exists for suits by a federal agency to enjoin state court proceedings in order to avoid frustration of "federal systems of regulation." 404 U.S. at 146. This Court has not had occasion to address whether a similar exception exists under Section 1341. It seems apparent, however, that imposition (for example) of a prohibitive excess tax on organizational picketing would interfere with the NLRB's regulatory responsibilities no less than the proceedings to enjoin such picketing that were at issue in *Nash-Finch*. Moreover, Section 2283, with its

express series of exceptions (none of which applied in *Nash-Finch*), is not textually more conducive than Section 1341 to an implied exception. We may assume for purposes of this case, therefore, that a similar exception would apply under Section 1341. "For the Federal Government and its agencies, * * * access to the federal courts is 'preferable in the context of healthy federal-state relations.'" *Nash-Finch*, 404 U.S. at 147 (quoting *Leiter Minerals*, 352 U.S. at 226).

B. This Court Need Not Address Whether An Exception To The Tax Injunction Act Applies For Suits Brought Only By Federal Instrumentalities Because Production Credit Associations Do Not Meet Any Of The Prevailing Tests For Avoiding The Act's Prohibition On Jurisdiction

1. As we describe in more detail in our brief at the petition stage (at pages 9-14), the courts of appeals have come to varying results in determining whether, and in what circumstances, a federal agency or instrumentality may, notwithstanding the Tax Injunction Act, bring suit in federal district court to enjoin state taxes when the United States is not a co-plaintiff. The most restrictive approach would find no such exception under Section 1341 when the federal instrumentality sues without the United States as a co-plaintiff. See, *e.g.*, *United States* v. *State Tax Comm'n*, 481 F.2d 963, 975 (1st Cir. 1973) (stating that it was "reasonable, as a prerequisite to by-passing normal state tax collection and litigation channels, that [federal instrumentalities] persuade the Attorney General of the United States, acting on behalf of [them], to join in their claim"); *Housing Auth. of Seattle* v. *Washington*, 629 F.2d 1307, 1311-1312 (9th Cir. 1980) (suggesting that federal instrumentality could not avoid the Tax Injunction Act without the United States as a co-plaintiff).

A less restrictive approach, more compatible with the rationale of *Nash-Finch*, follows "a flexible test in which 'each instrumentality must be examined in light of its governmental role and the wishes of Congress as expressed in relevant legislation.'" *Bank of New England Old Colony, N.A.* v. *Clark*, 986 F.2d 600, 602-603 (1st Cir. 1993) (quoting *Federal Reserve Bank of Boston* v. *Commissioner of Corporations & Taxation of Massachusetts*, 499 F.2d 60, 64 (1st Cir. 1974)). Under that approach, courts have scrutinized the legislation pursuant to which the federal instrumentality operates to ascertain whether the interests it is pursuing are "indistinguishable from those of the sovereign [such that] there are good reasons to relieve them of any symbolic requirement of joinder with and by the United States." *Federal Reserve Bank*, 499 F.2d at 62.[7]

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[7] A number of cases addressing whether a federal instrumentality may avoid the Tax Injunction Act have involved the Federal Deposit Insurance Corporation (FDIC), acting in its various capacities as regulator or receiver of savings institutions. See, *e.g.*, *Simon* v. *Cebrick*, 53 F.3d 17, 22-23 (3d Cir. 1995); *FDIC* v. *City of New Iberia*, 921 F.2d 610, 613 (5th Cir. 1991). The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, contains explicit and detailed provisions (see, *e.g.*, 12 U.S.C. 1821(d) and 1825(b)(2)) with respect to the operations of the FDIC as receiver of insolvent institutions that may constitute specific modifications of, or limitations upon, the operation of the Tax Injunction Act insofar as the FDIC as receiver is concerned. See, *e.g.*, *Simon* v. *Cebrick*, *supra*; *Donna Indep. Sch. Dist.* v. *Balli*, 21 F.3d 100 (5th Cir. 1994); *Matagorda County* v. *Russell Law*, 19 F.3d 215 (5th Cir. 1994);

Under any of the approaches that have heretofore prevailed in the courts of appeals, the district court would lack jurisdiction to consider petitioner's claim as a "federal instrumentality" able to overcome the prohibition of the Tax Injunction Act. First, the United States is not a co-plaintiff in this lawsuit. See *Housing Auth.*, 629 F.2d at 1311. Thus, this Court's decision in *Department of Employment* is not directly controlling. Second, no substantial governmental or regulatory interest is at stake that warrants keeping the suit in federal, as opposed to state, court. See *Bank of New England*, 986 F.2d at 602-603; *FDIC* v. *New York*, 928 F.2d 56, 59 (2d Cir. 1991). And finally, the production credit associations at issue are not acting as "arms of the federal government," such that a state tax "call[s] directly into question the sovereign interest of the United States." *Federal Reserve Bank*, 499 F.2d at 62. Thus, respondents are not analogous to the NLRB in *Nash-Finch* because the production credit associations seeking to avoid the prohibition in the Tax Injunction Act here can assert no sovereign governmental function or federal regulatory purpose.

Accordingly, it is sufficient in deciding this case for the C[illegible]rt to hold that production credit associations do not assert any sovereign interest to justify finding an implied exception to the Tax Injunction Act in a suit in which the United States is not a co-plaintiff. Like the intervening federal savings and

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FDIC v. *Lowery*, 12 F.3d 995 (10th Cir. 1993). Since this case does not involve the FDIC, and the cases set forth in the text involved the Tax Injunction Act without any asserted modification by FIRREA, that statute and the decisions under it have no bearing on this case.

loan associations involved in the First Circuit's decision in *State Tax Commission*, *supra*, in their operation and function respondents are private lending institutions subject to control comparable to that applicable to state-organized and -controlled lending institutions. The government of the United States launched them with financial support, but that support has been long since withdrawn, and they now act in the interests of themselves and their members.

2. In response to our brief at the petition stage, respondents cite cases involving federal land banks in support of their contention that they "are 'instrumentalities of the federal government, engaged in the performance of an important governmental function.'" Resp. Br. in Response to Br. for U.S. as Amicus Curiae 5 (quoting *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941)). See also *ibid.* (quoting *Federal Land Bank of Wichita* v. *Board of County Comm'rs*, 368 U.S. 146, 150-151 (1961)). Those cases did not involve whether the federal land banks were "federal instrumentalities" for purposes of the Tax Injunction Act. Both cases came to this Court on writs of certiorari to state supreme courts.

Numerous cases in the lower courts have recognized that an entity may be a "federal instrumentality" for some purposes but not others.[8] Thus, even if

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[8] Thus, production credit associations, for example, have been held not to be federal instrumentalities for purposes of gaining an additional 30 days in which to file an appeal (which the government receives), see, *e.g.*, *Hoag Ranches* v. *Stockton Prod. Credit Ass'n*, 846 F.2d 1225, 1228-1229 (9th Cir. 1988), but they have been found to be federal instrumentalities that are immune from punitive damage awards, see, *e.g.*, *Smith* v. *Russellville Prod. Credit Ass'n*, 777 F.2d 1544, 1550 (11th Cir.

a federal instrumentality is not exempt from the strictures of the Tax Injunction Act, there may be circumstances in which it would succeed on the merits of avoiding state taxes because its underlying statute confers on it, as was the case for the federal land banks, an applicable exemption from taxation. That is a different issue, however, from whether the "federal instrumentality" sufficiently performs governmental or regulatory functions to be entitled to an implied exemption from the jurisdictional prohibition of the Tax Injunction Act.[9]

For these reasons, the case should have been dismissed for lack of subject-matter jurisdiction.

1985). We express no view on the correctness of those decisions, save to observe that the statutory context in which the issue of federal instrumentality status arises may dictate differing results for the same entity. Compare *Irwin Memorial Blood Bank* v. *American Nat'l Red Cross*, 640 F.2d 1051, 1057 (9th Cir. 1981) (Red Cross is not federal instrumentality for application of Freedom of Information Act) with *United States* v. *City of Spokane*, 918 F.2d 84, 88 (9th Cir. 1990) (distinguishing *Irwin Memorial* and holding that Red Cross is a federal instrumentality for tax purposes), cert. denied, 501 U.S. 1250 (1991). Correspondingly, this case presents no occasion for this Court to address the question of federal instrumentality status in other legal contexts, or in the factual contexts of the diverse federal instrumentalities not before the Court.

[9] Respondents further contend that production credit associations are federal instrumentalities because Congress reiterated that fact and provided federal financial assistance to institutions in the Farm Credit System in the Agricultural Credit Act of 1987. See Resp. Br. in Response to Br. for U.S. as Amicus Curiae 6. That argument proves too much, since it would suggest that Congress intends to create an exception to the Tax Injunction Act every time it appropriates federal assistance to any recipient. There is no support in the text or history of the 1987 Act for such a broad rule.

II. THE LEVY OF SALES AND INCOME TAXES BY THE STATE OF ARKANSAS UPON PRODUCTION CREDIT ASSOCIATIONS IS CONSISTENT WITH THE FARM CREDIT ACT

On the merits, the court below relied on circuit precedent that, "[w]here there is federal immunity from taxation, Congress must express a clear, express, and affirmative desire to waive that exemption." Pet. App. A5 (quoting *Federal Reserve Bank of St. Louis* v. *Metrocentre Improvement Dist. #1*, 657 F.2d 183, 186 (8th Cir. 1981), aff'd, 455 U.S. 995 (1982)). In the court's view, the 1985 amendments to the Farm Credit Act that removed the exemption from state taxation for production credit associations in which the United States held an ownership interest were immaterial, because the statute now contains "no provision * * * which indicates an intent on the part of Congress to waive the [production credit associations'] tax immunity as federal instrumentalities." *Id.* at A6.

The court's reliance on an implied immunity from state taxation in the context of the Farm Credit Act was erroneous. As this Court has made clear, while "absent express congressional authorization[] a State cannot tax the United States directly," *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 175 (1989) (citing *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)), Congress determines whether, and to what extent, instrumentalities performing federal functions are exempt from state and local taxation. *United States* v. *New Mexico*, 455 U.S. 720, 733-735, 737-738, 743-744 (1982); *Department of Employment*, 385 U.S. at 358, 359-361. The language, structure, and history of the Farm Credit Act make clear that Con-

gress intended for privately owned, for-profit production credit associations to be subject to the types of sales and income taxes Arkansas seeks to impose.

A. By Its Plain Terms, Section 2077 Confers Only A Narrowly Defined Tax Exemption Inapplicable Here Rather Than A Broad Exemption From State Sales And Income Taxes For Production Credit Associations

1. Since the original enactment of the Farm Credit Act in 1933, Congress has declared that all production credit associations are federal instrumentalities—regardless of whether the federal government owned any stock in them—and that, as such, their "notes, debentures, bonds, and other such obligations * * * shall be exempt both as to principal and interest from all taxation" except for "surtaxes, estate, inheritance, and gift taxes." Ch. 98, § 63, 48 Stat. 267. If the federal government held an ownership interest in a production credit association, a broader exemption from all state and federal taxes applied. *Ibid.*; see App., *infra*, 3a-4a; Pub. L. No. 92-181, § 2.17, 85 Stat. 602. By 1968, however, the provision conferring the broader exemption from state taxation no longer had any practical effect, because the federal government did not hold any stock interest in any production credit association. See H.R. Rep. No. 425, *supra*, at 116.

In 1985, Congress restructured the Farm Credit System and withdrew the federal government's authority to own stock directly in production credit associations. Pub. L. No. 99-205, § 101, 99 Stat. 1678; H.R. Rep. No. 425, *supra*, at 28-29. As part of this effort to make the System more self-sufficient, Congress created the Farm Credit System Capital Corporation to provide emergency investments in System entities with capital raised from within the System. Pub. L. No. 99-205, § 103, 99 Stat. 1680-1687; H.R. Rep. No. 425, *supra*, at 13-15. For the future, any federal government financial support was limited to investments in the Capital Corporation. Pub. L. No. 99-205, § 101, 99 Stat. 1678; H.R. Rep. No. 425, *supra*, at 28-29. As a result of that restructuring, Congress also passed various technical amendments to 12 U.S.C. 2077 (formerly codified at 12 U.S.C. 2098 (Supp. III 1985)). Those amendments deleted the reference to the federal government's stock ownership in the associations and the part of Section 2077 that authorized the broader exemption from federal and state taxation when the federal government owns stock in a production credit association. From its inception in 1933 to the present, therefore, nothing in the language of Section 2077 or its precursors supports the court of appeals' holding that Congress intended to create an exemption from state sales and income taxes for privately owned production credit associations.

2. Nor does anything in the legislative history of Section 2077 suggest such an intent. Because the statutory language prior to 1985 was unequivocal on this point, the court of appeals' conclusion must rest on Congress's intent in enacting the 1985 amendments. Yet nothing in the legislative history of those amendments suggests that Congress intended to grant to production credit associations any revived or new immunities from taxation. Indeed, in removing prior provisions authorizing the federal government to maintain direct stock holdings in the associations, as well as the original provisions conferring the broader exemption from state tax when the United States holds an ownership interest in the asso-

ciations, the legislative history specifies that Congress intended to make only "technical and conforming amendments." H.R. Rep. No. 425, *supra*, at 28. If Congress had intended to alter the status quo in the 1985 amendments and to create a broad immunity from taxation for privately owned production credit associations, it is unlikely to have done so by a "technical amendment." See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) ("[S]ilence [in legislative history] * * * while contemplating an important and controversial change in existing law is unlikely."). Yet the decision below in effect assumes the exact opposite: even though Congress had explicitly created an exemption from taxation only in certain specifically defined contexts, the court nonetheless held that Congress impliedly intended to establish a much broader exemption. See Pet. App. A6.

The court's assumption is particularly implausible in view of the history of Section 2077. Congress had never before granted a privately owned production credit association a comprehensive immunity from taxation. See, *e.g.*, *Columbus Prod. Credit Ass'n* v. *Bowers*, 180 N.E.2d 1 (Ohio), cert. denied, 371 U.S. 826 (1962); *Woodland Prod. Credit Ass'n* v. *Franchise Tax Bd.*, 37 Cal. Rptr. 231, 233 (Dist. Ct. App. 1964) ("It is difficult * * * to avoid the belief that, once these associations became farmer-owned, Congress meant to place them on a tax parity with comparable, privately held entities."). Moreover, the context in which the 1985 amendments were enacted is contrary to the assumption that Congress intended the technical amendments to work the sweeping change attributed to them by the court below. Congress was well aware that production credit associations are

for-profit private entities chartered by the federal government and that, altogether, they maintain billion-dollar loan portfolios and receive billions of dollars in gross income. Consequently, Congress intended in the 1985 amendments not to subsidize the production credit associations, but rather to give the Farm Credit System the tools with which to use existing capital in the System to aid those with special financial needs. See H.R. Rep. No. 425, *supra*, at 7-8, 11-12. The history behind Section 2077, therefore, does not support the court of appeals' holding that Congress, by implication, newly conferred upon production credit associations a broad-based exemption from federal, state, and local taxes.

B. The Overall Context And History Of The Farm Credit Act Also Negate The Claim Of Immunity In This Case

From the original enactment of the Farm Credit Act, Congress explicitly determined which federally chartered lending institutions within the Farm Credit System are entitled to comprehensive immunity from taxation and which are not. In addition to production credit associations, the Farm Credit System includes farm credit banks, federal land bank associations, and banks for cooperatives. 12 U.S.C. 2002(a). With respect to each entity, the Farm Credit Act contains a "taxation" provision that delineates specifically the immunity from taxes enjoyed by that entity. See 12 U.S.C. 2023 (farm credit banks), 2077 (production credit associations), 2098 (federal land bank associations), 2134 (banks for cooperatives). For farm credit banks and federal land bank associations, Congress explicitly provided the type of comprehensive immunity that the court of appeals held to be

implied here for production credit associations. For example, under 12 U.S.C. 2022,

> [t]he Farm Credit Banks and the capital, reserves, and surplus thereof, and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes on real estate held by a Farm Credit Bank to the same extent, according to its value, as other similar property held by other persons is taxed.

That exemption is almost identical to the language for federal land bank associations in 12 U.S.C. 2098. As to both entities, the exemption language has been largely unchanged since the Farm Credit Act of 1971. See Pub. L. No. 92-181, §§ 1.21, 2.8, 85 Stat. 590, 597.[10]

By contrast, banks for cooperatives have been granted only the limited exemption from taxation accorded to production credit associations with respect to their obligations. See 12 U.S.C. 2134. Prior to the 1985 amendments to the Farm Credit Act, banks for cooperatives (like production credit associations) also possessed a broad-based exemption from taxation that was contingent upon the United States' stock ownership. See Pub. L. No. 92-181, § 3.13, 85

[10] Section 1.21 of the Farm Credit Act of 1971 addressed the taxation of both federal land banks and federal land bank associations. Section 2.8 referred to the taxation of federal intermediate credit banks. Federal land banks and federal intermediate credit banks were merged and became "farm credit banks" under the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 410, 101 Stat. 1637 (1988) (codified at 12 U.S.C. 2011(a)). As part of the 1987 Act, the taxation statutes were redesignated as Sections 1.15 and 2.17 for farm credit banks and federal land bank associations, respectively. Pub. L. No. 100-233, § 401, 101 Stat. 1629, 1637.

Stat. 608. That contingent exemption was repealed in 1985 by the same technical amendments that applied to the associations. See Pub. L. No. 99-205, § 205(e)(10), 99 Stat. 1705.

Congress thus "intentionally and purposely" chose to grant an expansive immunity from taxation to farm credit banks and federal land bank associations, while at the same time conferring a more limited exemption (concerning only their notes, debentures, and other obligations) with respect to production credit associations and banks for cooperatives. Had Congress wished to confer upon production credit associations the more comprehensive exemption from taxation that it had provided to federal credit banks and federal land bank associations, it presumably would have done so expressly as it had elsewhere in the Farm Credit Act. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Congress, however, did not "write the statute that way." *Russello*, 464 U.S. at 23 (quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979)).[11]

[11] Congress also has demonstrated its ability to provide federal instrumentalities with broad exemptions from state taxation outside of the Farm Credit Act. For example, in the Federal Credit Union Act, Pub. L. No. 86-354, 73 Stat. 628 (1959) (12 U.S.C. 1751 *et seq.*), federal credit unions, their property, their funds, and their income are exempt from all federal, state or local taxation, except that, like farm credit banks, their real and personal property are subject to taxation "to the same extent as other similar property is taxed." 12

The effect of the court of appeals' decision is to grant to respondents a tax exemption equal to or potentially greater than that which Congress explicitly provided to farm credit banks and federal land bank associations (see Pet. App. A11 & n.5 (Loken, J., dissenting)). That result alters significantly the extent to which States and localities have been empowered to tax production credit associations since at least 1968—an empowerment that has resulted in millions of dollars in tax revenues. See, *e.g.*, Farm Credit Admin., *42nd Annual Report of the Farm Credit Administration: 1974-1975*, at 87 (1976). Nothing in Section 2077, the Farm Credit Act as a whole, or the pertinent legislative history indicates that Congress meant for its 1985 "technical" amendments to effect such a sweeping change.

U.S.C. 1768. Federal reserve banks have been granted similarly expansive tax exemptions as well. 12 U.S.C. 531. Those statutes further point up the illogic in the court's holding and in respondents' arguments in support of it—namely, that Congress *sub silentio* granted production credit associations a comprehensive exemption from all federal, state, and local taxation.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with instructions that it be dismissed by the district court for lack of subject-matter jurisdiction. In the alternative, the judgment of the court of appeals should be reversed on the merits.

Respectfully submitted.

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APPENDIX

1. The Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583, as amended (12 U.S.C. 2001 *et seq.*), provides in pertinent part as follows:

* * * * *

§ 2002. Farm Credit System

(a) Composition

The Farm Credit System shall include the the[1] Farm Credit Banks, the Federal land bank associations, the production credit associations, the banks for cooperatives, and such other institutions as may be made a part of the System, all of which shall be chartered by and subject to regulation by the Farm Credit Administration.

* * * * *

§ 2071. Organization and Charters

(a) Charter

Each production credit association shall continue as a Federally chartered instrumentality of the United States.

(b) Organization

(1) In general

Production credit associations may be organized by 10 or more farmers or ranchers or producers or harvesters of aquatic products desiring to borrow money under the provisions of this part.

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[1] So in original. [Second "the" probably should not appear.]

* * * * *

(7) Approval of articles

On approval of the proposed articles by the Farm Credit Administration, and on the issuance of a charter, the association shall become as of such date a federally chartered body corporate and an instrumentality of the United States.

* * * * *

§ 2077. Taxation

Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

2. Section 2.17 of the Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 602, prior to its amendment by Section 205(e)(16) of the Farm Credit Amendments Act, Pub. L. No. 99-205, 99 Stat. 1705 (1985), provided as follows:

> SEC. 2.17. TAXATION. Each production credit association and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such associations shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now

> or hereafter imposed by the United States or any State, territorial, or local taxing authority. Such associations, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such associations shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such associations shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the production credit associations is held by the Governor of the Farm Credit Administration.

3. Section 63 of the Farm Credit Act of 1933, ch. 98, 48 Stat. 267, provided as follows:

> SEC. 63. The Central Bank for Cooperatives, and the Production Credit Corporations, Production Credit Associations, and Banks for Cooperatives, organized under this Act, and their obligations, shall be deemed to be instrumentalities of the United States, and as such, any and all notes, debentures, bonds, and other such obligations issued by such banks, associations, or corporations shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any

State, Territorial, or local taxing authority. Such banks, associations, and corporations, their property, their franchises, capital, reserves, surplus, and other funds, and their income, shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such banks, associations, and corporations shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. The exemption provided herein shall not apply with respect to any Production Credit Association or its property or income after the stock held in it by the Production Credit Corporation has been retired, or with respect to the Central Bank for Cooperatives, or any Production Credit Corporation or Bank for Cooperatives, or its property or income after the stock held in it by the United States has been retired.